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In The
# Supreme Court of the United States

October Term 1998

## FRANCISCO CHAVEZ MISOLA,
*Petitioner,*

v.

## U.S. IMMIGRATION & NATURALIZATION SERVICE,
*Respondent.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

## Petition for Writ of Certiorari

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41 pp

## QUESTIONS PRESENTED FOR REVIEW

A. Whether federal courts treat the definition of a refugee on account of political opinion in a uniform manner.

B. Whether the Court of Appeals and the Board of Immigration Appeals correctly decided the case below, and whether their decisions were supported by substantial evidence.

C. Whether the decisions of this Court and the lower courts are in accordance with U.S. obligations under international refugee instruments.

## LIST OF ALL PARTIES BELOW

Francisco Chavez Misola, Petitioner;

Lauren Mathon, Patricia A. Cole, and Michael J. Heilman, Board of Immigration Appeals Members;

Paul Shearman Allen and Pauline M. Schwartz, Counsel for the Petitioner;

Frank W. Hunger, Assistant Attorney General, and David M. McConnell, Office of Immigration Litigation, United States Department of Justice, Counsel for Respondent

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FRANCISCO CHAVEZ MISOLA,
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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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# PETITION FOR WRIT OF CERTIORARI

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## OPINION BELOW

The September 2, 1998 opinion of the United States Court of Appeals for the Fourth Circuit, Pet. App.1-6,[1] is unreported.

## BASIS FOR JURISDICTION IN THIS COURT

The Board of Immigration Appeals, Executive Office for Immigration Review, of the Department of Justice, dismissed the Petitioner's appeal of an earlier immigration judge's decision on June 19, 1997. Pursuant to 8 U.S.C.

[1] "Pet. App." references are to the Appendices to the Petition.

§1252(a), Immigration and Nationality Act §242(a), the Petitioner filed a timely Petition for Review in the United States Court of Appeals for the Fourth Circuit.

On September 2, 1998 the Court of Appeals dismissed the petition for review. This Court has jurisdiction to review the Fourth Circuit's decision pursuant to 28 U.S.C. §1254(1).

On December 1, 1998, upon application of the petitioner, the Supreme Court granted an extension of the usual 90-day statutory period to file a petition for writ of certiorari, and ordered that the deadline to file the petition be extended to January 4, 1999.

## STATUTORY PROVISIONS INVOLVED

The statutory provisions involved include the sections of the Immigration and Nationality Act ("INA") defining "refugees" and outlining their eligibility for asylum and withholding of deportation. These include INA §208(b), 8 U.S.C. §1158(b):

(b) Conditions for Granting Asylum.

> (1) In general. The Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Attorney General under this section if the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).

The INA provides for mandatory withholding of removal to certain countries in 8 U.S.C. §1251(b)(3), INA § 241(b)(3):

(3) Restriction on removal to a country where alien's life or freedom would be threatened.

> (A) In general. Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

Finally, the INA, §101(a)(42)(A), 8 U.S.C. §1101(a)(42)(A), defines who qualifies as a refugee:

(42) The term "refugee" means:

> (A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. . ."

## STATEMENT OF THE CASE

*The Facts*

Petitioner Francisco Chavez Misola, also known as "Frank" Misola, appeals the decision of the Court of Appeals, dismissing his claim for political asylum and withholding of deportation from his native Philippines.

This case is about a man who refuses to support violent Communist rebels in his native country. The facts of the case are not in dispute. Misola was a well-to-do landowner and farmer in his hometown of Santa Cruz, Zambales Province, in the Philippines. Certified Administrative Record at 88.[2] His profit from his farming endeavors reached over $100,000 per year, and he employed both permanent and temporary farmworkers.

The New People's Army, or "NPA", is the armed wing of the Communist Party of the Philippines. Some time in 1988 or 1989, the NPA became an active force in the area surrounding Misola's farm. Mr. Misola testified that he did not support the Communist Party or the NPA, and that the goal of the NPA was to "overturn the duly constituted government" of the Philippines. C.A.R. 91.

The NPA demanded "war taxes" from certain people - landowners and businessmen - in the areas in which they were active. C.A.R. 92. If the subjects did not agree to comply with the demands for money, they were threatened and sometimes killed.

Mr. Misola's cousin, Jesse Angeles, a landowner and well-off farmer like himself, was one of the unlucky ones. He owned a farm about two miles from Mr. Misola's holdings. C.A.R. 93. In August 1989, Jesse was approached by NPA members and asked for a contribution of 2,000 pesos. He did not have the money at the time, so the

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[2] References to the Certified Administrative Record, "C.A.R.," are to the administrative record which was prepared for the Court of Appeals.

men left. A few weeks later, the same men returned, this time requesting a sum of 50,000 pesos. In response to this demand, Jesse went into hiding. Several months later, his decapitated body was found in a riverbank. He had been murdered by the NPA.

Misola received a combination extortion letter and death threat from the NPA on June 5, 1991. The letter demanded money and was wrapped in a black ribbon, which meant that he would be killed if he failed to comply. Terrified, Misola immediately went into hiding, never to return to his hometown. After six months of attempting to find a safe place to hide in the Philippines, Misola fled, entering the United States on December 31, 1991 on a diplomatic staff visa. C.A.R. 214.

*The Decisions Below*

The Board of Immigration Appeals ("BIA" or "Board"), on June 19, 1997, denied Misola's appeal of the immigration judge's earlier decision, which denied his applications for asylum and withholding of deportation to the Philippines. The BIA found it "credible that the NPA attempted to extort money from the respondent [Misola] and his fellow landowners, and those who refused to cooperate, including his cousin, were threatened or worse." Pet. App. 10.

Relying on the BIA case Matter of T-M-B-, the Board concluded that "while the respondent may well have had a well-founded fear of harm from the NPA for refusing to pay them money, there is no evidence that such harm was politically motivated. . . Attempts to extort money do not constitute persecution, where it is reasonable to conclude that those attempting the extortion are not motivated by the victim's political opinion." Pet. App. 10.

On September 2, 1998, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the BIA. The Court of Appeals found, "We agree with the BIA

that while Misola may have had a well-founded fear of harm from the NPA for refusing to pay money, there is no evidence that such harm was politically motivated." Pet. App. 4.

The Court of Appeals erroneously found that Mr. Misola remained in the Philippines for an eighteen-month period after he received the death threat. Pet. App. 5. There was evidence in the record that Mr. Misola remained in the Philippines for only six months between the time of his death threat and the time he left for the United States.

The Court of Appeals concluded that the "BIA acted reasonably in concluding that Misola failed to show that the NPA's actions were anything other than an attempt to extort money, and that the NPA's interest in Misola was not motivated either by his political opinion or his status as a wealthy landowner." Pet. App. 6.

## REASONS FOR GRANTING THE WRIT

### A. Federal Courts Do Not Treat the Issues Raised by This Case in a Uniform Manner

The court and the agency below did not dispute the fact that Misola had a well-founded fear of harm from the NPA. However, his claim was denied because the court believed that he was unable to create a sufficient nexus between the motives of the NPA and the threats that he feared. This case therefore turns on the language of the statute which states that a refugee's fear of persecution must be "on account of" some protected characteristic.

More specifically, this case turns on the courts' interpretations of the "imputed political opinion" doctrine. The leading Supreme Court case on the imputed political opinion doctrine is INS v. Elias-Zacarias, 502 U.S. 478 (1992). Despite the years which have passed since the Court's decision in that case, the lower courts' treatment of

imputed political opinion asylum cases has been anything but consistent.

The Elias-Zacarias Court held that, in order for a person to be a refugee on account of his political opinion, the applicant must demonstrate that he was persecuted or fears persecution on account of his own political opinion, not that of the persecutor. Id. at 482. The difficulty with this is that some courts, since the Elias-Zacarias case, have recognized that a political opinion may be imputed to an asylum applicant, while some have not.

The Ninth Circuit, in a case that was remanded from the Supreme Court, in light of the Elias-Zacarias decision, reaffirmed that the imputed political opinion doctrine survived the Supreme Court decision. Canas-Segovia v. INS, 970 F.2d 599 (9th Cir. 1992). "Elias-Zacarias left open the possibility that persecution based on a political opinion falsely attributed to the victim could provide the basis for relief." Id.

The Ninth Circuit has also recognized that an asylum applicant may establish his political opinion either affirmatively (through testimony or past activities), by imputed political opinion (by direct or circumstantial evidence), or by expressing "hazardous neutrality." See Sangha v. INS, 103 F.3d 1482 (9th Cir. 1997).[3]

Moreover, in Sangha, the Court of Appeals recognized that the Supreme Court, after the Elias-Zacarias decision, "left open, however, what type of direct or circumstantial evidence might suffice to show motivation [whether the persecutors sought out the alien "on account of" actual or imputed political beliefs]. Since Elias-Zacarias, we have found persecution on account of political opinion when the persecutors say they are acting because of the victim's

[3] Unlike the applicant in Sangha, who held no express or imputed political opinions, Misola holds an anti-Communist political opinion, as represented by his testimony before the immigration judge, and is also imputed to have a disloyal, anti-Communist political opinion by the NPA.

political beliefs. . . We have also found such persecution when there is no other logical reason for the persecution. Id. (citations omitted).

The federal district courts of California have recently interpreted the imputed political doctrine in the context of extortion demands. In Shukoor v. Rogers, 954 F. Supp. 1415 (C.D.CA. 1997), the petitioner was a facially neutral businessman from Sri Lanka. He was approached by the People's Liberation Front, or "JVP", a group dedicated to the violent overthrow of the government. After repeated demands for money, the petitioner gave the JVP approximately $40,000. Thereafter, the Sri Lankan Army arrested and tortured the petitioner, accusing him of being a JVP supporter. The federal court overturned the agency's decision and determined that the petitioner had suffered at the hands of the Army due to his imputed political opinion.

In Vera-Valera v. INS, No. 96-70317, (9th Cir. 1998), a panel of the Court of Appeals recently reversed itself on rehearing, and found that a Peruvian businessman with anti-guerilla beliefs[4] feared persecution on account of imputed political opinion. This is despite the fact that the root of the dispute between the applicant and the guerillas was economic, as opposed to purely political.

In another recent case, the Ninth Circuit granted withholding of deportation to another Peruvian businessman, the owner of a video game business who was subject to threats and made to pay "protection money" by the Shining Path guerillas. Gonzalez-Neyra v. INS, No. 96-70467 (9th Cir. 1997). The facts of this case bear a remarkable parallel to Misola's. Both men were perceived as being successful and ideologically opposed to the aims of the communist guerilla groups, the Shining Path in Peru and the NPA in the Philippines. Even though the Shining Path guerillas who sought out Gonzalez had economic motives, the Court still

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[4] The guerilla group which Vera-Valera feared was the "Sendero Luminoso," or "Shining Path," Maoist guerillas.

found that there was persecution on account of political opinion.

In another recent case, the Ninth Circuit remanded the case of a man from the Philippines who had received death threats from the NPA, similar to the one which Misola received. Garrovillas v. INS, 156 F.3d 1010 (9th Cir. 1998). While the case was remanded due to an erroneous negative credibility finding by the BIA, the Court did find that, if credible, the petitioner's testimony would establish past persecution. The Court recognized that recruitment attempts and death threats from a terrorist group were sufficient to establish persecution under the INA.

It is clear to see that, had Misola's case been brought before the Ninth Circuit, instead of the Fourth Circuit, the result would probably have been different. The Court of Appeals decision barely touched upon Misola's arguments that he was persecuted and fears persecution on account of imputed political opinion. See Pet. App. 1-6. The Court below erroneously focused on evidence that the NPA targeted both landowners and peasants in the Philippines for extortion. Pet. App. 4. While this is the case, it is also correct that the NPA does not view the peasants as their political or ideological enemies, while they do view wealthy landowners as enemies. Thus, the motivation of the NPA in Misola's case, like that of the Shining Path in Gonzalez-Neyra, was both economic and on account of the actual and imputed political opinions of Misola. Their threat to him was not made in a vacuum.

The First Circuit, as well as the Ninth, has granted a more generous application of the imputed political opinion doctrine. In Osorio v. INS, 18 F.3d 1017 (1st Cir. 1993), the petitioner, a labor union leader, received a written death threat, but was denied asylum by the BIA, on the grounds that he did not fear persecution based on his political opinions, because he his dispute with the government was economically motivated.

The Court of Appeals reversed, stating that the phrase "persecution on account of the victim's political opinion," does "not mean persecution solely on account of the victim's political opinion. That is, the conclusion that a cause of persecution is economic does not necessarily imply that there cannot exist other causes of persecution. . . . Any attempt to unravel economic from political motivation is untenable in this case." Id. at 1028.

Much as the petitioner urged the Fourth Circuit to do, the Court in Osorio looked at the "underlying political context" of the situation between the petitioner and the persecutor, in his case, the government. The Court found that the petitioner Osorio "represented a political threat to the government's authority. . ." Id. at 1029. In the same way, Misola's refusal to pay the NPA was also a political threat to its authority and to its revolutionary goals.

The Third Circuit has also defined the political opinion category more broadly than the Fourth Circuit in the instant case. Political opinion was defined broadly in Chang v. INS, 119 F.3d 1055 (3d Cir. 1997), where Chang did not report to his government that his colleagues were considering defecting to the United States. Chang feared that he would be prosecuted under Chinese law for failure to report, the BIA denied his asylum claim on the grounds that he feared prosecution and not persecution on account of a protected characteristic.

The Court of Appeals reversed, stating that Chang was persecuted on account of his political opinion. Chang took a risk in defying his government. "To characterize this action and Chang's motivation in taking it as anything other than political narrows the term "political" beyond recognition." Id. at 1062.

B. The Analysis of Both the BIA and the Court of Appeals in this Case was Incorrect, and Misola Should be Granted Asylum

To be considered a refugee under U.S. law, an applicant must demonstrate a "well-founded fear of persecution." Both the BIA and the Supreme Court have set out a two-part test for this legal standard. First, the applicant must have a subjective fear of persecution. Second, that fear must be objectively well-founded. INS v. Cardoza-Fonseca, 480 U.S. 421 (1986).

Courts have recognized that "an alien seeking asylum is often limited in the evidence he can obtain to show proof of political persecution." Artiga-Turcios v. INS, 829 F.2d 720, 723 (9th Cir. 1987). "Persecutors are hardly likely to provide their victims with affidavits attesting to their acts of persecution." Bolanos-Hernandez v. INS, 767 F.2d 1277, 1285 (9th Cir. 1984). Just as persecutors are unlikely to provide affidavits attesting to acts of persecution, so too are they unlikely to provide affidavits of direct evidence of their intent or motivation in threatening or persecuting an individual.

The Court of Appeals and the BIA recognized that Mr. Misola had a fear of harm from the NPA. Pet. App. 4. This type of harm which he fears constitutes persecution. The United Nations High Commissioner for Refugees (UNHCR) recognizes that "a threat to life or freedom on account of race, religion, nationality political opinion or membership of a particular social group is always persecution." UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status, para. 51. Both Mr. Misola's life and freedom were indeed threatened in the Philippines. His life was threatened by the note with the black ribbon, with its implication of assassination as punishment. His freedom was not only threatened, but it was severely curtailed while he was in hiding from the NPA.

Both the Court of Appeals and the BIA failed to recognize that the NPA possesses a mixed motive against Mr. Misola. In Matter of T-M-B-, Interim Decision 3307 (BIA 1997), the Board recognized that a persecutor may have a mixed motive for threatening and persecuting an individual.[5] In Matter of S-P-, Interim Decision 3287 (BIA 1996), the Board found that an applicant for asylum need not prove conclusively the persecutor's motive, but must produce reasonable evidence that the persecutor was motivated, at least in part, by a protected characteristic. Matter of S-P-. In this case, the NPA had a mixed motive to persecute Mr. Misola. It was motivated by a desire to raise money for its revolutionary activities, but it was also motivated by a desire to elicit moral and political support from Mr. Misola. The fact that the NPA was motivated, in part, by a wish to obtain Misola's money does not preclude a finding of a well-founded fear of persecution on account of a protected characteristic.

The mixed motive case analysis was applied by the BIA in Matter of T-M-B-, yet it failed to recognize that the persecutor - the NPA - possessed a mixed motive. While the communist organization was motivated in part by financial concerns (i.e., to raise money for their cause), its members are also motivated to target and punish those whose political views are opposite to theirs. The majority of the BIA incorrectly analyzed the facts in Matter of T-M-B-, by failing to recognize that this mixed motive exists on the part of the NPA.

A more reasonable interpretation of the facts in Matter of T-M-B- was that outlined in the dissenting opinion by Board Member Lory Rosenberg, as well as the dissenting opinion by Board Chairman Paul Schmidt.

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[5] Matter of T-M-B- involved a Philippine national who also feared persecution from the NPA. The applicant's parents owned a show store where she worked, and she was forced to pay money to the NPA. She left the country after the NPA physically harmed her. The majority of the BIA found that the motivation of the NPA in that case was economic.

Board Member Rosenberg recognized in that case that the "NPA's actions are also consistent with the politically motivated goals of punishing and overcoming the respondent's political opposition and securing her allegiance to their cause through intimidation and physical abuse." Matter of T-M-B-, supra, Dissent, Board Member Rosenberg (emphasis added). The NPA's motivation is the same in Misola's case.

Board Member Rosenberg found that the victim's social class or status was a factor considered by the NPA in its acts of persecution. Id. Board Member Rosenberg also realized that the more severe were the threats and extortion demands, "so increases the likelihood that a victim can establish that she qualifies for asylum." Id.

The BIA found, in Misola's case, that "Attempts to extort money do not constitute persecution, where it is reasonable to conclude that those attempting the extortion are not motivated by the victim's political opinion." Pet. App. 10.

It was unreasonable for the BIA to conclude this, because there was evidence that the extortion was motivated by the victim's actual and imputed political opinion. Mr. Misola explained his political opinion at his deportation hearing. Mr. Misola fears persecution on account of his actual and imputed political opinion. His opinion is that he did not wish to support violent Communist rebels. At his deportation hearing, Misola was asked why he did not pay the NPA's revolutionary taxes. Mr. Misola explained that the NPA did not represent the "legitimate government" and thus he did not wish to "be associated with them" or "give help to their cause." C.A.R. 97 - 98. These statements indicate that Mr. Misola's political opinion was opposite that of the NPA. He did not consider them the legitimate government and thus did not wish to bear any allegiance to them.

There is ample evidence in the record that the NPA views people like him, that is, wealthy landowners and

businessmen, as "class enemies". This evidence also confirms Misola's account of why he was targeted by the NPA:

> "By many accounts, the NPA collects war taxes from large landowners and small farmers. . . These taxes are significant for the NPA, because it receives no foreign financing. A significant share of NPA and Party activities was supported by an elaborate system of taxation primarily targeting larger foreign- and Filipino-owned businesses, large landowners, concerns engaged in ranching, fish and prawn culture, logging and mining, and even government corporations -- all of whom were categorized by the CPP as "class enemies." . . . Businesspeople or landowners who refused NPA demands were subject to economic sabotage or assassination." C.A.R. 182. (Emphasis added).

The Court of Appeals stated, "Misola specifically denied that he was involved in any political group; he testified that he was not active in politics." Pet. App. 4. This is true in one sense, but not in another. Misola refused to pay money to Communists to support their "revolutionary" goals. His refusal was the expression of a political opinion, i.e., "I do not support the NPA or other Communists." Having expressed this opinion, Misola is involved politically.

The Court of Appeals found that "there was no evidence in the record that [Misola's] views were known to the NPA." Pet. App. 4. The NPA knew full well that Misola did not pay them any money, and the NPA knew that Misola did not support them. This political opinion of Misola's was known to the NPA.

As required under Matter of Mogharrabi, Misola possessed a belief or trait: "I do not wish to support violent communists." The persecutor, the NPA, was aware of this belief, the persecutor had both the capability of overcoming this belief and the inclination to do so (as evidenced by the fate of Misola's cousin). Thus, the decision of the BIA was not supported by substantial evidence, and the Court of Appeals should not have dismissed Misola's petition for review.

Contrary to the assertions of the Court of Appeals, Misola's fear of harm at the hands of the NPA remains well-founded today, as the NPA is still a force active in the Philippines.[6] The NPA even has a presence on the Internet, where it recently posted a Press Release of Communist Party of the Philippines' Chairman Armando Liwanag's address on the 29th anniversary of the NPA's founding. Pet. App. 11. This address boasted that "the NPA has been able to launch tactical offensives within its capabilities in different parts of the country because of its consolidated and expanded mass base." Pet. App. 11.

In discussing the recent elections in the Philippines, Chairman Liwanag opined that no matter who the winner, "there will be no fundamental change within the semicolonial and semifeudal system ruled by the big compradors and landlords and in the policy of subservience to the IMF, World Bank and WTO and the foreign monopoly firms." Pet. App. 13.

The people of the Philippines are exhorted to support the NPA in its struggles, for example, to "pursue the people's war more vigorously than before, carry out intensive and extensive guerrilla warfare at the current stage and launch tactical offenses. . ." The Party leader also calls for the masses to "carry out land reform as the main content of the democratic revolution," and to "[e]nforce the tax

[6] The Court of Appeals noted that "Department of State country reports. . . .reveal that the NPA is diminishing in size and resources, and in its ability to carry out threats." Pet. App. 5.

policy of the people's revolutionary government." These goals of the NPA directly threaten those such as Misola. As a wealthy landowner, Misola is one of the people who the "land reform" of which the NPA leader speaks will be carried out against.

C. The Court's Refusal to Grant Protection to Misola Violates International Standards

The United States acceded to the 1967 U.N. Protocol Relating to the Status of Refugees in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577. The U.S. thus became bound to follow the standards for defining and treating refugees outlined in the Protocol.

The obligation of the United States to abide by the Refugee Protocol cannot be over-emphasized. Law Professor Carolyn Blum correctly notes that, since a refugee's own nation may be his source of oppression, "Another state, then, must intervene and guarantee those fundamental liberties; if not, the refugee cannot possibly benefit from the core values of human rights law." Carolyn Blum, "A Question of Values: Continuing Divergences Between U.S. and International Refugee Norms," 15 Berk. J. Int'l Law 38 (1997).

One of Professor Blum's major criticism's of the U.S. treatment of refugees is the increasingly narrowed definition of "refugee" which the courts are advocating. She expresses grave concern with this Court's decision in the Elias-Zacarias case. The Court places too heavy a burden on an asylum applicant by requiring them to prove the motive of his persecutors, when often such evidence is simply unavailable to those fleeing their homelands.

"The cramped legal analysis [of Elias-Zacarias] provided little substantive guidance to adjudicators and failed to account for the real difficulties of proof in asylum cases. Both the INS and some circuit courts, in their reviews of asylum decisions, have seen the Court's analysis in Elias-

Zacarias as a license to deny claims that have all the earmarks of meritorious cases." Id. at 41 (citations omitted). See also Deborah Anker, Carolyn Blum, and Kevin Johnson, Comment, INS v. Zacarias: Is There Anyone Out There?, 4 Int'l J. Refugee L. 267, 268 (1992).

Professor Blum correctly points out that the Supreme Court's restrictive decisions "chose to ignore the clear mandates of the underlying United Nations treaties on which U.S. domestic legislative language was based. The political values promulgated in those international instruments require a more charitable interpretation of the law in order to effect protection from persecution. However, the Court's decisions accomplish the opposite result; their constrained and grudging analysis has served to constrict protection available for refugees." Blum, "A Question of Values," at 42.

The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, which is recognized as a persuasive source for interpretation by the United States, also advocates a less restrained analysis. The Handbook recognizes that a refugee must show a well-founded fear of persecution because of race, nationality, religion, political opinion, or membership in a social group. However, the Handbook also recognizes that "Often, the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyse his case to such an extent as to identify the reasons in detail." UNHCR Handbook, para. 66.

The UNHCR, thus, supports an interpretation of the "on account of" portion of the refugee definition less restrictive than the Supreme Court has decided. The asylum applicant may be unaware of the actual motivations behind his persecutors' desire to harm him. Even if he is aware of those motives, he may have little ability to prove the motives of his feared persecutors. However, his fear of harm may still legitimately be on account of his political opinion. There is no language in the statute which requires that the applicant prove that phrase "on account of. . . political

opinion" relate necessarily to the opinions of the applicant, nor does the plain language of the statute dictate that the motives of the persecutors be proven.

Because the risk of harm in deporting an alien who truly qualifies as a refugee is so grave, this Court should be concerned with any disparities in the interpretation of the refugee definition or the Protocol's enforcement. This Court should revisit the 1992 Elias-Zacarias decision, in light of the decision's divergence from the Protocol as well as the harsh result of the lower courts' implementation of that decision.

## CONCLUSION

The petition should be granted.

Respectfully submitted,



*PAUL SHEARMAN ALLEN

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January 4, 1999

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**UNPUBLISHED**
**UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

FRANCISCO CHAVEZ MISOLA,
Petitioner,

v.

U.S. IMMIGRATION & NATURALIZATION SERVICE,
Respondent.

No. 97-1929

On Petition for Review of an Order
of the Board of Immigration Appeals.
(A72-418-366)

Submitted: March 31, 1998
Decided: September 2, 1998
Entered: September 2, 1998

Before WILKINS and NIEMEYER, Circuit Judges, and HALL, Senior Circuit Judge.

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Petition denied by unpublished per curiam opinion.

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**COUNSEL**

Paul Shearman Allen, PAUL SHEARMAN ALLEN & ASSOCIATES, Washington, D.C., for Petitioner. Frank W. Hunger, Assistant Attorney General, David M. McConnell,

Assistant Director, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

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Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

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**OPINION**

PER CURIAM:

Petitioner Francisco Chavez Misola, a citizen of the Philippines, seeks review of a Board of Immigration Appeals (BIA) decision and order affirming the immigration judge's decision finding Misola deportable, denying his application for asylum[1] and withholding deportation,[2] and granting voluntary departure. Misola claims that he was persecuted while in the Philippines and that he has a well-founded fear of persecution if he returns to the Philippines. After review, we deny the petition.

To be eligible for refugee status and discretionary asylum, Misola must show a reasonable possibility of persecution, or that a reasonable person in similar circumstances would fear persecution on account of his political beliefs, membership in a particular social group, or one of the other enumerated provisions of the statute. 8 U.S.C.A. §§ 1101(a)(42)(A), 1158 (West Supp. 1998); Huaman-Cornelio v. Board of Immigration Appeals, 979 F.2d 995, 999 (4th Cir. 1992). Factual determinations regarding an alien's statutory eligibility for asylum are reviewed for substantial evidence. 8 U.S.C.A. § 1105a(a)(4) (West Supp. 1998); INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992). The standard is extremely deferential, requiring a

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[1] See 8 U.S.C.A. § 1158(a) (West Supp. 1998).
[2] See 8 U.S.C.A. § 1253(h) (West Supp. 1998).

reviewing court to uphold the BIA's denial unless an alien demonstrates that the evidence presented was "so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." Id. at 483-84; Huaman-Cornelio, 979 F.2d at 999. Fear which may be well-founded, but which does not arise on account of an applicant's race, religion, nationality, membership in a social group, or because of political opinion, do not qualify an alien as a refugee. See Matter of Mogharrabi, 19 I. & N. Dec. 439, 447 (BIA 1987).

Misola asserts that based on the evidence of record, a reasonable factfinder would have to conclude that he has a well-founded fear of persecution in the Philippines, and that the BIA abused its discretion in reaching the opposite conclusion. We find, however, that substantial evidence supports the BIA's affirmance of the immigration judge's finding that Misola failed to meet his statutory burden. Misola testified at the hearing held by the immigration judge that he was being persecuted by the New People's Army (NPA) throughout the Philippines. Specifically, he claims that the NPA extorted money from him and his fellow landowners, and that those who failed to cooperate, including Misola's cousin, were threatened or killed.[3] According to Misola, he received a note with a black ribbon around it from a small boy. He said the ribbon indicated a death threat. The note requested that Misola pay fifty thousand pesos and gave instructions for its delivery. After receiving the letter, Misola abandoned his farm and left town. He testified that he did not want to pay the money because he did not want to support the communists. He also attested that he did not contact the police or the military because they could not handle the NPA in his area because they were overworked. He testified that he believes that he is

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[3] Misola attested that his cousin, a farm owner like himself, was asked to contribute a sum of money to the NPA, that he refused to pay the money, went into hiding, and was found two days later with his head cut off. Misola testified that this was the usual manner in which the NPA killed those who failed to comply with their tax demands.

on a "black list" and that if the NPA ever found him, they would kill him.

Misola was vague as to his whereabouts during the eighteen months after he left his farm and before he came to the United States, although he did admit that he remained in the Philippines during this time. He further admitted that during that eighteen-month period, he received no threats, despite the active presence of the NPA in the various areas in which he lived.

The immigration judge and the BIA found Misola unable to satisfy the standards for granting asylum or withholding deportation. We agree with the BIA that while Misola may have had a well-founded fear of harm from the NPA for refusing to pay them money, there is no evidence that such harm was politically motivated. In fact, Misola specifically denied that he was involved in any political group; he testified that he was not active in politics, and did not support any political actions or groups. He described himself as a"law-abiding citizen" who regularly paid his taxes.

There is no evidence that Misola was singled out by the NPA because of his political views or his membership in a social group. Misola failed to establish that those attempting extortion were motivated by their victims' real or perceived political opinion. Misola testified that the NPA sought money for war taxes from landowners, business people and peasants alike. The record evidence, by way of Misola's testimony as well as the documentary evidence presented, reveals that the purpose for the extortion was for the NPA to obtain financing to further its cause. Moreover, while Misola did not support the goals of the NPA, there is no evidence in the record that his views were known to the NPA. Likewise, while Misola claims on appeal that his fear of persecution was based also upon his status as a wealthy landowner, and that the NPA targeted the wealthy as members of a social group, his own testimony at the hearing before the immigration judge that the NPA also sought

money and support from the peasants in the Philippines cuts against this claim.

The existence of a generalized political motive of the NPA is insufficient to establish Misola's fear of persecution on account of political opinion under the applicable statute. See Elias-Zacarias, 502 U.S. at 482. Nor is there evidence that the NPA actually imputed any political opinion to Misola and sought to persecute him based on that imputed opinion,[4] other than background evidence constituting pronouncements of private organizations, which we find to be insufficient by itself to overturn the BIA's judgment. See M.A. v. INS, 899 F.2d 304, 313 (4th Cir. 1990) (in banc).

We conclude that substantial evidence supports the immigration judge's finding that Misola did not meet his statutory burden. While the evidence is undisputed that the NPA is operating in parts of the Philippines and are known to make the type of threats which Misola has described, no threats were made to him after he left his farm, despite the fact that he remained in various parts of the Philippines for eighteen months after he received the note tied with the black ribbon. Misola also admitted that his sisters continue to live in the Philippines without incident. Further, Department of State country reports in evidence, which reports were considered by the immigration judge, reveal that the NPA is diminishing in size and resources, and in its ability to carry out threats. While there are certainly areas in the Philippines where individuals are vulnerable to the NPA, the evidence supports the conclusion that the Philippine government is able to control the NPA in other areas. Accordingly, the record supports the immigration judge's finding that Misola did not establish that his fear of persecution by the NPA is countrywide. See Matter of Acosta, 19 I. & N. Dec. 211, 235 (BIA 1985).

The record does not compel a finding that the immigration judge erred in concluding that Misola failed to

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[4] See, e.g., Sangha v. INS, 103 F.3d 1482, 1489 (9th Cir. 1997).

establish a well-founded fear of persecution on account of political opinion or any of the other grounds for which asylum may be granted. See Elias-Zacarias, 502 U.S. at 483-84; Huamon-Cornelio, 979 F.2d at 999. Misola failed to establish that the NPA will persecute him because of his political opinion or his membership in a social group, or that he faces any harm beyond the political unrest in the Philippines itself. See Elias-Zacarias, 502 U.S. at 483; M.A., 899 F.2d at 314-15. We find that the BIA acted reasonably in concluding that Misola failed to show that the NPA's actions were anything other than an attempt to extort money, and that the NPA's interest in Misola was not motivated either by his political opinion or his status as a wealthy landowner.

Because Misola failed to meet the less stringent burden of proof required for asylum, he cannot meet the higher standard for proving eligibility for withholding of deportation under 8 U.S.C.A. § 1253(h) (West Supp. 1998). See INS v. Cardoza-Fonseca , 480 U.S. 421, 431-32 (1987); Huaman-Cornelio, 979 F.2d at 1000.

We therefore affirm the decision of the Board of Immigration Appeals and deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED

**U.S. Department of Justice**
Executive Office for Immigration Review
Board of Immigration Appeals
5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

Dated: June 19, 1997

Pauline M. Schwartz, Esquire
Paul Shearman Allen & Associates
1329 18th Street, N.W.
Washington, D.C. 20036

MISOLA
A72 418 366

Enclosed is a copy of the Board's decision in the above-referenced case.

Very Truly Yours,

/s/ _____
Paul W. Schmidt
Chairman

Enclosure

Panel Members:

Lauren Mathon
Patricia A. Cole
Michael J. Heilman

**U.S. Department of Justice**
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A72 418 366 – Arlington Date: June 19, 1997

In re: FRANCISCO CHAVEZ MISOLA
a.k.a. Frank Misola

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Pauline M. Schwartz, Esquire
Paul Shearman Allen & Associates
1329 18th Street, N.W.
Washington, D.C. 20036

ON BEHALF OF SERVICE:

Bruce Dizengoff
Acting District Counsel

CHARGE:

Order: Sec. 241(a)(1)(C)(i),
I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)]
– Nonimmigrant – failed to comply
with conditions of status

APPLICATION: Asylum; withholding of deportation

ORDER:

PER CURIAM. The respondent's appeal from the Immigration Judge's decision is dismissed. The request for oral argument is denied.

Notwithstanding the appellate contentions, we conclude that the respondent failed to demonstrate that a reasonable person in his circumstances would fear persecution on account of one of the five enumerated grounds for asylum, and that he failed to satisfy the higher standard of proof for eligibility for withholding of exclusion and deportation. See sections 101(a)(42)(A), 208(a), and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(42)(A), 1158(a), and 1253(h); INS v. Blias-Zacarias, 502 U.S. 478 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Rodriguez-Rivera v. INS, 848 F.2d 998 (9th Cir. 1988); Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987); Carcamo-Flores v. INS, 805 F.2d 60 (2d Cir. 1986); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987). We also conclude that the respondent has not shown past persecution sufficient to warrant a grant of asylum. See Matter of Chen, 20 I&N Dec. 16 (BIA 1989).

The respondent contends, through counsel, that the Immigration Judge erred in concluding that he lacked credibility, and in concluding that he did not demonstrate that he could not avoid persecution by the New People's Army ("NPA") throughout the Phillippines. However, we note that the Immigration Judge found the respondent generally to have been a credible witness, although he did tend to wax vague in describing his events after he left his farm. Additionally, had the Immigration Judge determined in his decision, or had we concluded, that the respondent was persecuted by the NPA, then the matter of his ability to avoid the persecution country-wide would be pertinent.

This case, however, does not turn on a lack of credibility or a lack of ability to avoid persecution country-

wide. This case turns on the fact that the respondent failed to show that he was persecuted by the NPA in the past or that his fear of persecution by the NPA in the future is well-founded. We find it credible that the NPA attempted to extort money from the respondent and his fellow landowners, and those who refused to cooperate, including his cousin, were threatened or worse. Nonetheless, while the respondent may well have had a well-founded fear of harm from the NPA for refusing to pay them money, there is no evidence that such harm was politically motivated. See Matter of T-M-B-, Interim Decision 3307 (BIA 1997). Attempts to extort money do not constitute persecution, where it is reasonable to conclude that those attempting the extortion are not motivated by the victim's political opinion. Id.

FURTHER ORDER: Pursuant to the Immigration Judge's order and in accordance with our decision in Matter of Chouliaris, 16 I&N Dec. 168 (BIA 1977), the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and, in the event of his failure so to depart, he shall be deported as provided in the Immigration Judge's order.

/s/_____
Patricia A. Cole
FOR THE BOARD

Press Release
March 29, 1998

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## MESSAGE TO THE NEW PEOPLE'S ARMY

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## CPP CHAIRMAN ARMANDO LIWANAG ISSUES MESSAGE ON 29TH NPA ANNIVERSARY

Armando Liwanag, chairman of the Central Committee of the Communist Party of the Philippines has issued a message to mark and celebrate the 29th anniversary of the founding of the New People's Army on March 29, 1998.

The message is now posted at the website of the National Democratic Front of the Philippines on the Internet:

http://www.geocities.com/~cpp-ndf
http://www.geocities.com/CapitolHill/2078/index.html

Hereunder are important excerpts from the message:

On the People's War

The NPA has been able to launch tactical offensives within its capabilities in different parts of the country because of its consolidated and expanded mass base. Last year, we were able to capture a significant number of weapons from the enemy through raids and ambushes. Our initiative in battle was so high that we wiped out enemy units or captured enemy officers and men.

The tactical offensives in the second half of last year embarrassed the enemy nationally and internationally because they occurred soon after the highest military officials of the enemy boasted that the NPA had disintegrated and had been driven to remote areas and

because two of these were carried out in town centers close to the national capital region and close to the headquarters of the Second Infantry Division.

The enemy's embarrassment was aggravated when he was compelled to negotiate the release of the prisoners of war after the failure of AFP pursuit operations. High-ranking police officers who had been taken prisoner in Rizal and Mindoro were released by the NPA to the International Committee of the Red Cross (ICRC) under the NPA policy of lenient treatment and upon humanitarian considerations under the Geneva Conventions and its protocols. Reciprocally, the enemy released a number of political prisoners.

## The crisis situation in the country

The Philippines is stricken with a far worsened social and economic crisis. This is the result of de-nationalization, privatization, deregulation, liberalization and labor flexibility, all policies dictated by the imperialists and followed unquestioningly by their local running dogs. Advantageously there are already the revolutionary forces, long tempered in the course of the people's war and revitalized by the rectification movement to further arouse, organize and mobilize the people against the imperialists and their reactionary stooges.

Great storms are brewing in the Philippines. The broad masses of the people are outraged by the abrupt reduction of their incomes and sources of income. Since July last year, devaluation and widespread loss of jobs have ravaged the lives of the people. There is an exceedingly fertile ground for all forms of resistance.

The people are revolted by the huge amounts of foreign debt and local public debt that have been squandered on all kinds of anti- industrial activities. These have been characterized by high consumption of the exploiting classes

and by the superprofit-taking by the foreign monopoly firms. The export income from low value-added manufacturing and raw materials were always falling far below the expenditures for imports.

Elections

The reactionary classes are currently engaged in an electoral exercise. This cannot stabilize the political and economic situation. This can serve only to exacerbate the political crisis of the ruling system, especially the factional strife among the reactionary factions.

Encouraged by popularity polls, the strongest opposition presidential candidate is convinced that he will win, if he is not cheated. Thus, if he does not win and the candidate of the ruling party wins, then there will be massive unrest in the country. The ruling party proved its ability to cheat in the 1995 reactionary elections.

However, no matter who wins the presidential contest, there will be no fundamental change within the semicolonial and semifeudal system ruled by the big compradors and landlords and in the policy of subservience to the IMF, World Bank and WTO and the foreign monopoly firms.

The Party has denounced the current electoral process of the reactionary state as a farce and as a real instrument for imposing on the people their oppressors and exploiters. At the same time, the Party pointed to the need to apply revolutionary dual tactics and united front tactics in dealing with progressive and reactionary allies and in taking advantage of the splits among the reactionaries.

Comprehensive Agreement on Human Rights and International Humanitarian Law

On March 16, 1998, the negotiating panels of the Government of the Republic of the Philippines and the National Democratic Front of the Philippines signed the Comprehensive Agreement on Respect for Human Rights

and International Humanitarian Law. This is a highly important document. By a certain measure, it addresses the people's outcry for respect of human rights and international humanitarian law. In the hands of the revolutionary movement, it is beneficial to the broad masses of the people.

But there should be no illusion that a just and lasting peace is just around the corner. There is no basis for thinking that negotiations have laid aside the revolutionary process. In the peace negotiations, there are two more difficult topics of the substantive agenda to negotiate (social and economic reforms and political and constitutional reforms) before the question of ending the armed conflict and redisposition of forces can be discussed.

In the event that the Party and the NDFP decide to call for a ceasefire of short duration in order to conduct extensive consultations with the people on a nationwide scale, there should be no relaxation of vigilance and no reduction of firmness and militancy. Party members and Red fighters should attend to their work and should not expose themselves to enemy surveillance. Experience of ceasefires in the past has proven that recklessness has fatal consequences sooner or later.

Tasks

The entire Filipino people, the CPP, the NPA and the NDFP look forward to the celebration of the 30th anniversary of the NPA next year. Towards the celebration of such a historic milestone, the Red commanders and fighters are called upon to fulfill their fighting tasks and win still greater victories in the people's war for national liberation and democracy.

1. Follow the class leadership of the proletariat and the absolute leadership of the Communist Party of the Philippines and carry the rectification movement through to the end!

2. Carry forward the general line of the new-democratic revolution against foreign monopoly capitalism, domestic feudalism and bureaucrat capitalism!

3. Pursue the people's war more vigorously than ever before, carry out intensive and extensive guerrilla warfare at the current stage and launch tactical offensives within our capabilities!

4. Carry out land reform as the main content of the democratic revolution and give full play to the initiative of the masses in all campaigns for their social betterment and liberation!

5. Expand and consolidate the mass base, build the organs of political power and mass organizations and create more guerrilla fronts!

6. Train and develop Red fighters from the mass movement in the rural and urban areas!

7. Combine the experienced fighters with new fighters in the NPA units and in tactical offensives!

8. Engage in educational and cultural campaigns to raise the fighting spirit of the Red commanders and fighters and the broad masses of the people!

9. Enforce the tax policy of the people's revolutionary government, collect voluntary contributions of the people on the basis of benefits won and engage in production campaigns in order to foster self-reliance!

10. Learn from each other and strengthen the weaker regions and guerrilla fronts and bring them to a new and higher general level of development!

The conditions for making revolution are excellent. The entire world capitalist system is in grave crisis and disorder. The chronic crisis of the semicolonial and semifeudal system has plunged to a new depth. The Filipino people's revolutionary struggle for national liberation and democracy can surge forward to a bright future. #

Supreme Court, U.S.
FILED
APR 7 1999
CLERK

(2)

No. 98-1090

# In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANCISCO CHAVEZ MISOLA, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether substantial evidence supports the Board of Immigration Appeals' determination that petitioner failed to meet his burden of proving eligibility for asylum and withholding of deportation.

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# In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1090

FRANCISCO CHAVEZ MISOLA, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-6) is unpublished, but the decision is noted at 162 F.3d 1155 (Table). The opinions of the Board of Immigration Appeals (Pet. App. 8-10) and the immigration judge (A.R. 61-71)[1] are unreported.

[1] Petitioner did not reproduce the immigration judge's decision in the petition appendix. It may be found, however, on the indicated pages of the Certified Administrative Record, which was filed with court of appeals and is part of the court of appeals' record in this case. In this brief, "A.R." refers to that record. In addition, we have lodged a copy of the immigration judge's decision with the Clerk of this Court.

## JURISDICTION

The court of appeals entered its judgment on September 2, 1998. On December 1, 1998, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including January 4, 1999, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. The Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, as amended by the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, provides that an alien will be considered a "refugee" if he "is unable or unwilling to return to" his home "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (1994).[2] If the "Attorney General determines" that an alien qualifies as a refugee, the Attorney General may grant that person asylum in the United States, 8 U.S.C. 1158(a). The decision to grant or deny asylum, however, falls within "the discretion of the Attorney General." 8 U.S.C. 1158(a). An alien seeking asylum need only demonstrate a reasonable fear or risk of persecution. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 430-441 (1987). The alien bears the burden of proving that he is a refugee because he has the requisite well-founded fear of persecution. 8 C.F.R. 208.13(a) (1996).[3]

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[2] In this brief, unless otherwise indicated, all references to Title 8 refer to the 1994 main edition, which was in effect at the time this case arose.

[3] Section 604 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Tit. VI-A, 110 Stat. 3009-690, significantly revised the Immigration

In addition, "if the Attorney General determines" that the alien's "life or freedom would be threatened" in the country of deportation "on account of race, religion, nationality, membership in a particular social group, or political opinion," the alien may be eligible for "withholding of deportation or return." 8 U.S.C. 1253(h)(1). To be entitled to relief under that provision, the alien must demonstrate a "clear probability of persecution." *INS* v. *Stevic*, 467 U.S. 407, 430 (1984); 8 C.F.R. 208.16(b) (1996) (applicant bears the burden of proof of eligibility for withholding). If the alien makes such a showing, withholding of deportation is mandatory. 8 U.S.C. 1253(h)(1).[4]

2. Petitioner is a native and citizen of the Philippines. Pet. App. 2; A.R. 61. While in the Philippines, petitioner was a landowner, businessman, and farmer who earned approximately $110,000 per year, and who em-

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and Nationality Act's asylum provision. Those amendments, however, do not govern the present case because they apply to applications for asylum filed on or after April 1, 1997. IIRIRA, Tit. VI-A, § 604(c), 110 Stat. 3009-694; see also Pet. App. 1-2. The changes in asylum worked by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, Tit. IV-C, § 421(a), 110 Stat. 1270, do apply to this case because the AEDPA amendments govern asylum determinations made on or after the amendments' effective date of April 24, 1996. AEDPA, Tit. IV-C, § 421(b), 110 Stat. 1270. For purposes of petitioner's claim, however, the AEDPA amendments to the asylum provision did not alter the pre-AEDPA provision in any material way.

[4] IIRIRA substantially revised and rewrote 8 U.S.C. 1253. See IIRIRA, Div. C, Tit. III-A, § 305, 110 Stat. 3009-602. The withholding provisions are now codified at 8 U.S.C. 1231(b)(3) (Supp. II 1996). That amendment does not govern the present case because its provisions apply only to withholding applications of aliens who are placed in proceedings on or after April 1, 1997. IIRIRA, Tit. III-A, § 309(a) and (c), 110 Stat. 3009-625.

ployed permanent and temporary farmworkers. A.R. 87-88. Petitioner was not active in Philippine politics; he testified that he supported neither the rebel movements nor the government. A.R. 89. According to petitioner's testimony, in the late 1980s, the military arm of the Philippine Communist party, the New People's Army, became an active presence in his region of the country and extorted "war taxes" to finance the group's anti-government operations from "the citizens * * * especially the businessmen, landowners, the rich people, and even the peasants themselves." Pet. App. 3-4; A.R. 90-92. People who did not pay their war taxes allegedly were threatened or killed. Pet. App. 3. Petitioner further testified that the New People's Army executed his cousin for failing to pay war taxes. Pet. App. 3 & n.3.

Petitioner testified that, in June 1989, the New People's Army demanded money from him. Pet. App. 3; A.R. 96-97. He claimed that the son of one of his part-time workers gave him a letter that bore a black ribbon and demanded 50,000 pesos; the black ribbon allegedly denoted a death threat. A.R. 96. Petitioner did not pay because he did not want to help the New People's Army. A.R. 97-98. Petitioner did not indicate, however, that the New People's Army was aware of his desire not to be affiliated with it. A.R. 97-98; Pet. App. 3. After deciding not to pay the war taxes, petitioner abandoned his farm and fled with the assistance of some members of the local police. A.R. 97-99. Petitioner then lived in various parts of the Philippines unthreatened by the New People's Army until December 1991. Pet. App. 5; A.R. 99, 101-103, 115-116, 133-138.[5]

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[5] Petitioner submitted a new affidavit to the Board of Immigration Appeals in which he claimed that he received the death threat

3. Petitioner entered the United States on December 31, 1991, with authorization to remain for a temporary period as a nonimmigrant foreign government official. A.R. 67, 214. When petitioner failed to maintain that status, the Immigration and Naturalization Service initiated deportation proceedings against petitioner, pursuant to 8 U.S.C. 1251(a)(1)(C)(i). A.R. 75, 216. Petitioner conceded deportability, and sought asylum and withholding of deportation, claiming that he feared persecution by the New People's Army. A.R. 61.

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in June 1991, rather than 1989, and thus lived in the Philippines for only six months following the threat. A.R. 31-33; see also A.R. 200 (affidavit in support of application for asylum dates the threat in June 1991). In the affidavit submitted to the Board, petitioner ascribes the reference to the earlier date in his testimony as either a transcription error or a misstatement attributable to "nervous-[ness]" while testifying. A.R. 32. However, petitioner, whose native language is English (A.R. 74, 88), repeated or otherwise reaffirmed the June 1989 date at least seven times during his testimony at the hearing. A.R. 96, 97, 114, 115, 116, 119, 120. He also testified in some detail that he resided in other parts of the Philippines following the threat (A.R. 101) for periods of time ranging from eight to eighteen months (A.R. 115, 135, 136-138), which is inconsistent with his current claim that he fled to the United States six months after the threat. The immigration judge found that the threat was received in June 1989 (A.R. 65); the Board did not disturb that finding; and the court of appeals adopted it (Pet. App. 5). Accordingly, that finding should govern disposition of this petition. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"); cf. *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, * * * cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."), aff'd on reh'g, 339 U.S. 605 (1950).

The immigration judge rejected petitioner's application. A.R. 61-71. The immigration judge held that petitioner failed to establish his eligibility for asylum or withholding of deportation, concluding that the record contained no objective evidence supporting his claim that he will be persecuted in the Philippines on the basis of political opinion or any of the other protected grounds. A.R. 69. The immigration judge further found that, because petitioner had resided safely in other parts of the Philippines for a lengthy period of time after the threat, petitioner had not met his burden of showing that his fear of persecution was country-wide and could not be redressed through internal relocation. A.R. 70. In this regard, the immigration judge noted that State Department reports in the record indicated that the New People's Army "is diminishing in size and resources, and is also diminishing in its ability to carry out threats." *Ibid.*

The Board dismissed petitioner's appeal. Pet. App. 9-10. While the Board accepted petitioner's testimony that he feared retribution from the New People's Army for failing to comply with its demands for money, the Board explained that the record contained "no evidence that such harm was politically motivated," and that "[a]ttempts to extort money do not constitute persecution, where it is reasonable to conclude that those attempting the extortion are not motivated by the victim's political opinion." *Id.* at 10.

4. In an unpublished decision, the court of appeals denied the petition for review, concluding that substantial evidence supported the Board's decision that petitioner had not established the requisite fear of persecution based on political opinion or other protected characteristics. Pet. App. 1-6. The court explained that there was "no evidence" that the New People's

Army singled petitioner out "because of his political views or his membership in a social group." *Id.* at 4. Because petitioner testified that the New People's Army extorted money from "landowners, business people and peasants alike," petitioner "failed to establish that those attempting extortion were motivated by their victims' real or perceived political opinion." *Ibid.* Although petitioner claimed that he did not support the goals of the New People's Army, the court found no evidence that the New People's Army was aware of petitioner's views. *Ibid.* "Nor," the court continued, "is there evidence that the [New People's Army] actually imputed any political opinion to [petitioner] and sought to persecute him based on that imputed opinion." *Id.* at 5. Relying on this Court's decision in *INS* v. *Elias-Zacarias*, 502 U.S. 478 (1992), the court held that the mere "existence of a generalized political motive of the [New People's Army] is insufficient to establish [petitioner's] fear of persecution on account of political opinion under the applicable statute." Pet. App. 5. Finally, the court ruled that substantial evidence supported the conclusion that petitioner's fear of persecution was not country-wide. *Ibid.*

**ARGUMENT**

1. Petitioner contends (Pet. 6-10) that review is necessary to redress an alleged conflict in the circuits concerning the type of evidence that will support application of the imputed political opinion doctrine. That claim does not merit this Court's review.

a. Under the imputed political opinion doctrine, an alien may establish a fear of persecution based on political opinion by introducing evidence that a persecutor has undertaken its actions because of the persecutor's perception that the alien is a political opponent, even if

the alien in reality does not hold such views. See, *e.g.*, *Sangha* v. *INS*, 103 F.3d 1482, 1489 (9th Cir. 1997) (generally discussing asylum based upon imputed political opinion); see also *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992) ("Nor is there any indication (assuming, *arguendo*, it would suffice) that the guerrillas erroneously *believed* that Elias-Zacarias' refusal [to fight with them] was politically based."). This case presents no issue concerning the application of the imputed political opinion rationale, however. The Board and the court of appeals agreed that petitioner had produced no evidence that the New People's Army imputed any political opinion to petitioner. See Pet. App. 5 ("Nor is there evidence that the [New People's Army] actually imputed any political opinion to [petitioner]."); *id.* at 10 ("no evidence" that threats were politically motivated). Thus, even if we assume, *arguendo*, that courts have varied somewhat in determining whether particular factual records contain sufficient evidence to compel a finding that persecution was based on imputed political opinion, the unpublished decision of the court of appeals in this case presents no occasion for consideration of that issue.

b. For the same reason, petitioner is incorrect in arguing (Pet. 9) that his case would have come out differently if decided in another circuit. Quite the opposite, within the Ninth Circuit, petitioner's claim would have been governed by *Sangha* v. *INS*, *supra*, where the Ninth Circuit, like the Fourth Circuit here, declined to apply the imputed political opinion rationale in the absence of any specific evidence that the persecutors acted out of an animus towards the alien's perceived political views. 103 F.3d at 1490 ("[T]here is no evidence to show that the [Bhindrawala Tiger Force] acted 'on account of' any political opinion it imputed to

Sangha."). In this case, as in *Sangha*, "it is equally likely that the [persecuting group] acted for other reasons," *ibid.*, such as a desire to strengthen the organization and help it achieve its own military goals, or to impose discipline, *id.* at 1490-1491.[6]

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[6] The other Ninth Circuit decisions upon which petitioner relies (Pet. 8-9) are of no help to him. In *Garrovillas* v. *INS*, 156 F.3d 1010 (1998), the threats against Garrovillas by the New People's Army were directly traceable to his service as an informant against the organization and his "anti-communist beliefs and his activities," of which the New People's Army was aware. *Id.* at 1012, 1016. By contrast, petitioner testified that he engaged in no political activities, and "there is no evidence in the record that his [political] views were known to the [New People's Army]." Pet. App. 4. Similarly, in *Gonzales-Neyra* v. *INS*, 122 F.3d 1293 (1997), amended by 133 F.3d 726 (1998), "Gonzales-Neyra provided evidence that he was persecuted, that he had a political opinion, that he expressed it to his persecutors, and that they threatened him only after he expressed his opinion," and that "the Shining Path representatives made it quite clear to Gonzales-Neyra that his political views motivated their hostility and threats." *Id.* at 1296. Petitioner introduced no such evidence in this case. See also *Vera-Valera* v. *INS*, 147 F.3d 1036, 1039 (9th Cir. 1998) (record evidence showed that "[t]he Sendero Luminoso members threatened Vera-Valera with his life because they felt his advocacy for the construction project represented political opposition to Sendero's goals[, and] * * * Sendero Luminoso believed that Vera-Valera was aligned with the government, whose opposition to the construction project was clearly political"). Furthermore, when presented with the virtually identical claim of persecution by a Philippine native opposed to paying the New People's Army's exactions, the Ninth Circuit rejected the claim because it concluded, like the Fourth Circuit here, that the threats were motivated by the victim's economic ability to pay, not his or her political opinion. See *Borja* v. *INS*, 139 F.3d 1251, 1254-1255 (1998). That the decision in *Borja* has now been withdrawn pending rehearing en banc, see 150 F.3d 1223 (1998), underscores the absence of a current conflict between the court of appeals' decision in this case and any rulings of the Ninth Circuit.

Nor do the decisions of the Second and Third Circuits that petitioner cites (Pet. 9-10) suggest that they would reach a different outcome in this case. In *Osorio* v. *INS*, 18 F.3d 1017 (2d Cir. 1994),[7] the court concluded that, while Guatemalan authorities persecuted union leaders in part for economic reasons, "substantial evidence * * * compel[led] the view that Guatemalan authorities persecuted Osorio because he and his union posed a political threat to their authority via their organized opposition activities," *id.* at 1029; that "Osorio's activities clearly evince[d] the political opinion that strikes by municipal workers should be legal and that workers should be given more rights," *id.* at 1030-1031; and that "Guatemala's persecution of Osorio was motivated in large part because it wanted to silence the expression of these political beliefs," *id.* at 1031. Petitioner, by contrast, introduced no evidence (and cites no record authority for his claims now (Pet. 9, 10, 12)) either that the New People's Army acted with such dual motivations when it threatened or harmed those who failed to comply with its monetary demands, or that the New People's Army read a political message into petitioner's failure to pay.

Likewise, in contrast to the present case, the evidence in *Chang* v. *INS*, 119 F.3d 1055 (3d Cir. 1997), "compel[led] the conclusion that China's motives in enforcing its rules against Chang are based on Chang's political opinion," *id.* at 1062, and, in particular, Chang's effort to protect others from punishment by the

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[7] Petitioner mistakenly attributes this case to the First Circuit (Pet. 9).

Chinese government, *id.* at 1063, and "opposition to the policy of the Chinese government," *id.* at 1065.[8]

2. Petitioner seeks (Pet. 11-16) this Court's review of the court of appeals' application of the substantial evidence standard to the facts of his case. This Court has long recognized, however, that "Congress has placed in the keeping of the Courts of Appeals" the task of evaluating whether an agency's decision is supported by substantial evidence. *Mobil Oil Corp.* v. *Federal Power Comm'n*, 417 U.S. 283, 310 (1974). "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Ibid.*; see also *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). That principle should apply with particular force when, as here, both levels of the administrative agency and the court of appeals concurred in their analysis of the record and its application to the governing law.

In any event, substantial evidence supported the Board's decision. In his testimony, petitioner admitted that he engaged in no political activities, and he introduced no evidence that the New People's Army was aware of his political views. Pet. App. 3-5. Petitioner also testified that the New People's Army extorted "taxes" from landowners and peasants alike, *id.* at 4, and "that the purpose for the extortion was for the [New People's Army] to obtain financing to further its cause," *ibid.*, not to punish others for their political

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[8] This Court recently denied a petition for a writ of certiorari in a case where the petitioner, like petitioner here, contended that record-specific variations in the outcomes of imputed political opinion cases constituted a circuit conflict meriting this Court's review. See *LaBorde* v. *INS*, 119 S. Ct. 866 (1999).

views. The court of appeals' ruling is thus consistent with this Court's decision in *INS* v. *Elias-Zacarias*, *supra*, which recognized that a court reviewing the Board's denial of an asylum claim may not presume that an alien has shown persecution on the basis of political opinion, whether actual or imputed, merely because he or she refused to cooperate with an alleged persecutor and suffered some retribution as a result. See 502 U.S. at 482 (evidence of forced recruitment into a guerrilla group, or retaliation for resisting forced recruitment, alone is insufficient to establish persecution on account of political opinion, because "[e]ven a person who supports a guerrilla movement might resist recruitment for a variety of [non-political] reasons").[9]

Furthermore, as the immigration judge and the court of appeals noted (A.R. 70; Pet. App. 5), petitioner separately failed to demonstrate that he faces a country-wide risk of persecution, because he was able to live without further disturbance in other regions of the Philippines for a lengthy period of time after being threatened by the New People's Army.[10]

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[9] See also *Cuevas* v. *INS*, 43 F.3d 1167, 1171 (7th Cir. 1995) (refusal to sell land despite threats from New People's Army was based on economics, not on account of a political opinion); *Bartesaghi-Lay* v. *INS*, 9 F.3d 819, 822 (10th Cir. 1993) (alien's fear of retribution for his refusal to participate in illegal drug activities was not a well-founded fear of persecution on account of political opinion).

[10] See, *e.g.*, *In re A-E-M-*, Interim Dec. No. 3338, 1998 WL 99555 (BIA Feb. 20, 1998) (fear of persecution insufficient where it did not "exist throughout that country"); *In re C-A-L-*, Interim Dec. No. 3305, 1997 WL 80985 (BIA Feb. 21, 1997) ("This Board has found that an alien seeking to meet the definition of a refugee must do more than show a well-founded fear of persecution in a particular place within a country. He must show that the threat of persecution exists for him country-wide."); 63 Fed. Reg. 31,947

3. Finally, petitioner argues (Pet. 16-18) that this Court should "revisit" its decision in *Elias-Zacarias* because, he contends, that decision conflicts with the "political values" underlying the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, and the United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (rev. ed. Jan. 1992) (UNHCR Handbook). That claim is without merit for three reasons.

First, assuming *arguendo* that petitioner has properly discerned the "political values" (Pet. 17) underlying the Protocol, courts are not bound by the unwritten values animating international instruments. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) ("[A] treaty cannot impose uncontemplated * * * obligations on those who ratify it through no more than its general humanitarian intent."). That is particularly true with respect to the Protocol, because it is not a self-executing treaty. See *United States* v. *Aguilar*, 883 F.2d 662, 680 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991); *Bertrand* v. *Sava*, 684 F.2d 204, 218-219 (2d Cir. 1982). Nor is the UNHCR Handbook binding on the INS, Congress, or the courts. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) ("We do not suggest, of course, that the explanation in the U.N.

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(1998) ("The Board and the Federal courts have long acknowledged the requirement of countrywide persecution as an integral component of the refugee definition, which cannot be met if the applicant reasonably could be expected to seek protection by relocating to another part of the country in question."). The Board found it unnecessary to reach the issue of whether the persecution petitioner claimed to face was country-wide. Pet. App. 9-10.

Handbook has the force of law or in any way binds the INS.").

Second, *Elias-Zacarias* is consistent with the Protocol. Nothing in the text of the Protocol regulates the evidentiary burdens signatory states apply in determining whether an individual satisfies the definition of "refugee." To the contrary, "the determination of refugee status under the 1951 Convention and the 1967 Protocol * * * is incumbent upon the Contracting State in whose territory the refugee finds himself." *Cardoza-Fonseca*, 480 U.S. at 439 n.22 (quoting UNHCR *Handbook* Foreword (II)).

Third, petitioner makes no argument that any principles concerning exceptions to the doctrine of *stare decisis* support reconsideration of *Elias-Zacarias*. See *e.g.*, *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991) ("*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."). That doctrine applies with "special force" here, because the interpretation and application of statutory law is at issue and thus "Congress remains free to alter what [the Court] ha[s] done." *Hohn* v. *United States*, 118 S. Ct. 1969, 1977 (1998).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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